* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ Ex. P. No.321 of 2003

Reserved on: 06.12.2007
% Date of decision: 04.01.2008

AJAY RELAN ...DECREE HOLDER
Through: Mr. Rajiv S. Endlaw with
Mr. A.T. Patra, Advocates.

Versus

PRANAY SOMAIA & ORS. ...JUDGEMENT DEBTORS

AND

CE CONSTRUCTION LIMITED ...OBSTRUCTIONIST
Through: Mr. Aman Lekhi, Sr. Advocate
with Mr. Rakesh Kumar &
Mr. Jaspreet S. Rai, Advocates
for the Obstructionist.

None for Judgement Debtors 1-4.

Mr. Sharad K. Agrawal with
Ms. Sangeeta Grover, Advocates
for Judgement Debtors 5-7.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

SANJAY KISHAN KAUL, J.

1. Shri K.D. Somaia (HUF), through its karta Shri K.D. Somaia was the owner of property No.S-23, Panchsheel Park, New Delhi in pursuance to a sale deed dated 3.2.1979 (Exhibit A-15) executed by Shri Balwant Singh Nag. Shri Balwant Singh Nag had acquired

the right of the property as a perpetual lessee in pursuance to a perpetual sub-lease deed dated 13.12.1967 (Exhibit A-3) executed by the President of India as the lessor with the Panchsheel Co-operative House Building Society Limited as the lessee.

2. An agreement to sell & purchase was executed on 16.9.1992 (Exhibit A-28) by Shri K.D. Somaia (HUF) through its karta Shri K.D. Somaia in favour of M/s. Durga Builders Private Limited (for short 'M/s. Durga Builders') in respect of the suit property. On receipt of full consideration, the possession of the property was handed over to M/s. Durga Builders in part performance of the agreement. A further agreement to sell was executed on 30.4.1993 in favour of the decree holder after necessary formalities in respect of the earlier agreement were completed including with the Income Tax Authorities. In respect of the agreement dated 30.4.1993, the competent authority under the Income Tax is stated to have granted permission on 23.7.1993 after verification at site that M/s. Durga Builders was holding the vacant and physical possession.

3. There was dispute which arose between the decree holder and the sellers with the result that the suit for specific performance was filed in this Court being CS (OS) No.749/1994. Since Shri K.D. Somaia, the registered owner passed away in the mean time, his legal heirs were impleaded as the first four defendants. The suit remained pending for nine (9) years when finally a compromise was arrived at between the parties resulting in a compromise decree dated 28.3.2003.

4. The decree holder claims that the possession of the first floor of

the property was not handed over nor was the sale deed executed as per the compromise decree and thus the present execution petition was filed. In the objections filed by judgement debtors 5 to 7 being M/s. Durga Builders and its two Directors, the Nandas, it was stated that there was some third party occupying the first floor on behalf of judgement debtors 5 to 7 and that judgement debtors 5 to 7 were unable to remove him. The possession of the remaining portion had been handed over to the decree holder.

5. In view of the aforesaid facts and circumstances a Local Commissioner was appointed vide order dated 21.7.2004 of this Court to visit the premises and report the status of possession. It was found that the first floor was in occupation of one Colonel Jairath, who claimed that he was in such occupation as a representative of the obstructionist, i.e. CE Constructions Limited. It is thereafter that objections were filed by the said obstructionist.

6. The case of the obstructionist is that M/s. Durga Builders had awarded construction work to the obstructionist at Faridabad in 1992-93 in respect of a project of M/s. Durga Builders but the obstructionist was not paid the outstanding sum of Rs.3.15 crore. It is at that stage that an understanding was arrived at between M/s. Durga Builders and the obstructionist that instead of M/s. Durga Builders making the said payment to the obstructionist, the money would be utilised for purchase of property for office purposes, which would be shared by the said two parties. In pursuance to the said arrangement, the original title deeds of the property were also deposited by M/s. Durga Builders to the

obstructionist as collateral. Thus, when M/s. Durga Builders got possession of the suit property from Shri K.D. Somaia on 27.1.1993, on the very next day the possession of the first floor was handed over to the obstructionist. Not only that, the Directors of M/s. Durga Builders also got executed a Will and a GPA in favour of Shri Arun Mehra, Managing Director of the obstructionist from Shri K.D. Somaia.

7. The obstructionist claimed that at the time of taking over of possession of the first floor on 28.1.1993, the intent was to have a small office set up but within a month of taking possession, the obstructionist realised that it would not be practical and thus the first floor was used by the obstructionist only for the purposes of storage of files and drawings. Such user continued till 1995 and towards the end of that year the obstructionist started using the first floor as a guest house. The first floor was so used as a guest house till 2000 and thereafter Col. Jairath, the Executive Director of the obstructionist moved into the first floor. The plea, thus, of the obstructionist is that they are not bound by a decree between the decree holder and the judgement debtors and it was alleged that the same was a collusive one.

8. The decree holder naturally controverted what was stated by the obstructionist and since the matter could not be decided without framing of issues and leading of evidence, on 16.5.2007, the following issues wee framed:

> "1. Whether the obstructionists acquired any right or interest in the suit property? If so, the date thereof? Onus on the obstructionists

2. Whether the decree in question was obtained in collusion between the parties to the suit and suffers from any fraud in turn affecting the rights of obstructionists? Onus on the obstructionists

3. Relief."

9. Since the onus was on the obstructionists, they were directed to file affidavits of evidence and retired Additional District Judge was appointed as the Local Commissioner to record evidence. The parties led their respective evidence by filing of affidavits and thereafter cross-examined the opposite party. The objectors produced Mr. Arun Mehra as a witness and thereafter in pursuance to the leave granted filed even a supplementary affidavit to produce certain documents. The decree holder appeared in the witness box himself.

10. Learned counsels for the parties were heard and on perusal of the pleadings and the submissions advanced by learned counsels for the parties, the findings on the issues are recorded hereinafter:

Issue No.1:

Whether the obstructionists acquired any right or interest in the suit property? If so, the date thereof? Onus on the obstructionists

11. The decree holder contended that the obstructionist has failed to prove any independent right to the suit property as they were put in possession by judgement debtors 5 to 7 and thus on the decree being passed they have to go out of the property along with the said judgement debtors. The decree holder claims that at best the claim of the obstructionist could be for recovery of money against judgement debtors 5 to 7 against which the obstructionist claimed to have been put in possession and handed over title documents as a collateral. There was no mortgage created and there is

nothing to evidence the same. The period of twelve (12) years had passed and the obstructionist had not taken any action for enforcement of the said alleged security and thus no defence on the basis of the said mortgage could be entertained. This was apart from the plea that there could only be a registered mortgage in such a situation and in any case there is no document evidencing deposit of title documents for securing any loan by way of equitable mortgage on deposit of such title documents. Learned counsel referred to the judgement of this Court in Ramesh Kumar & Ors. Vs. Yashpal Batra & Anr. AIR 2006 Delhi 286. It was held that in case of a simple mortgage where the defendant had executed a mortgage deed in respect of the suit property to secure loans from the plaintiff, the defendant ought to have exercised right to redeem the mortgage within the stipulated time and does not automatically become the owner of the property. A suit had to be filed for recovery of the amount within a period of twelve (12) years as per Article 62 of the Limitation Act, 1963 where a period of limitation of 12 years is prescribed to enforce payment of money secured by a mortgage or otherwise charged upon immovable property. The period had to commence when the money became due. Thus, the defendant was required to file a suit for fore-closure in respect of the mortgages as per Clause (a) of Section 67 of the Transfer of Property Act, 1882 (hereinafter referred to as the TP Act).

12. Learned counsel for the decree holder drew the attention of this Court to the testimony of Mr. Mehra where it had been stated that

at the stage of handing over of the title documents to the obstructionist, a writing was made. However, no such writing about the handing over of the documents has been filed on record. On a query being posed the witness could not say as to how much amount was sought to be secured by the deposit of title documents and only stated that during the period of January-February 1993 about Rs.2.00 to 3.00 crore were due.

13. Learned counsel for the decree holder, thus pleaded that since the obstructionist is claiming that the property was a security for the amount due, title documents were handed over and simultaneously even possession was given to the obstructionist, it is at best a case of usufructuary mortgage, which is defined under Section 58 Clause (d) of the TP Act, which reads as under:

> **“58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.**
> ....
> (d) Usufructuary mortgage-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.”

14. In view of the provisions of Section 59 of the TP Act, which are reproduced hereinafter such a mortgage could have been created only by registered document.

> **“59. Mortgage when to be by assurance**
> Where the principal money secured is one hundred

> rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.
>
> Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property."

15. The testimony of the said Mr. Mehra also shows that where in response to a question on one hand he had stated that he had checked the books of the obstructionist and Rs.2.00 to 3.00 crore was due from M/s. Durga Builders and balance sheet was prepared and filed with the Registrar of Companies on the basis of the said books, on the other hand he conceded thereafter that he had not checked the balance sheet and thus could not say whether in the balance sheet the said amount was shown as due from M/s. Durga Builders. The witness in order to cover up the said aspect sought to state that the balance sheet was prepared on a cash basis but could not indicate from which year the balance sheet was changed from cash to accrual basis.

16. The aforesaid aspect is important as urged by learned counsel for the decree holder, on account of the fact that under Section 209 of the Companies Act, 1956, the making of a balance sheet on accrual basis was made mandatory from 1988. The relevant provision has been shown to have been amended in the Companies Act by Companies Amendment Act, 1988 w.e.f 15.6.1988. Thus, when monies are claimed due from 1993 and remained due thereafter, the balance sheet which had to be on accrual basis had to reflect the said amount. In the alternative it

was pleaded that at least for the year 1992-93 when the monies accrued and had not been paid the balance sheet of that year would have reflected the said amount. No balance sheet whatsoever was produced by the obstructionist to substantiate the plea of such outstanding from judgement debtors 5 to 7.

17. The decree holder obtained the certified copies of balance sheet from the Office of the Registrar of Companies. Such balance sheets are for the period 1996 to 2003 (Exhibits D-1 & D-2). The balance sheets reflect no amount being due to the obstructionist from M/s. Durga Builders. On the other hand there is an entry of some amount having been received from M/s. Durga Builders in the year 1996.

18. The other aspect emphasised by learned counsel for the decree holder from the testimony of the said witness is that no charge was recorded with the Registrar of Companies in respect of the mortgage in favour of the obstructionist. This is in context of the mandatory requirement of Section 125 of the Companies Act that a charge on the assets of a company have to be compulsory lodged and cannot be enforced against a company otherwise. In the absence of the charge being registered by M/s. Durga Builders and not being insisted upon by the obstructionist as stated, the alleged mortgage in any case will not be enforceable.

19. Learned counsel for the decree holder also drew the attention of this Court to the perpetual sub-lease deed where Clause 6 prescribes the requirement of prior permission to be obtained from the perpetual lessor for a mortgage. The testimony of Mr.

Mehra shows that no such permission was obtained from the DDA.

20. In the cross-examination, the counsel for the decree holder had posed specific question to the witness about the electricity, water and telephone bills in respect of the first floor of the suit property in view of the controversy as to whether the obstructionist had at all occupied the property. The witness answered that such bills were available from the year 1999 to 2000 but for the prior period it was claimed that it is M/s. Durga Builders, who was paying the amount. Learned counsel has emphasised that there was no continuing relationship between M/s. Durga Builders and the obstructionist since the work allegedly done by the obstructionist was finished in the year 1996 and on re-examination claimed that the accounts were being maintained on accrual basis since the maintenance of accounts on accrual basis became mandatory in 1995, which is a falsity as the requirement came into existence in the year 1988. The witness was also confronted with the balance sheet for the year 1996 more specifically the list of debtors where the name of M/s. Durga Builders was not mentioned. Learned counsel emphasised that the onus to prove the issue was on the obstructionist but the obstructionist has failed to discharge the onus to prove any right or interest in the suit properties at least as could be permissible and enforceable in law. No account books or balance sheet were shown even though the obstructionist is a limited company. The requirement for creation of a security was also not proved.

21. Learned counsel also drew the attention of this Court to the

report of the Local Commissioner appointed in CS (OS) No.749/1994, who visited the property on 22.5.1994 and 25.5.1994. The report of the said Local Commissioner is Exhibit DHW-1/1 which showed that the possession of the property was only with M/s. Durga Builders. Learned counsel emphasised that the principles in relation to contract and disposition of property are also enshrined under Sections 91 & 92 of the Indian Evidence Act and thus a claim not borne out from the account books maintained by the party cannot be allowed. In this behalf learned counsel drew strength from the observations of the Division Bench of this Court in Liberty Sales Services Vs. M/s. Jakki Mull & Sons 1997 II AD (Delhi) 917 where it was observed in paragraph 11 that it was not open to a party to plead one case before the tax authorities and another case before the Court.

22. In the end learned counsel for the decree holder emphasised that obviously the obstructionist had come into possession either during the pendency of the suit or thereafter when interim orders were operating against judgement debtors 5 to 7. The original injunction order was passed on 18.4.1994 restraining taking over of possession by judgement debtors 6 & 7, but since judgement debtors 5 to 7 claimed to be in possession the same was modified on 20.5.1998 to the extent that the said judgement debtors were not to part with possession or alienate the property without leave of the Court.

23. Learned senior counsel for the obstructionist on the other hand sought to emphasise that the arrangement pleaded between

judgement debtors 5 to 7 and the obstructionist was of sharing of the property against the outstandings owned to the obstructionist by M/s. Durga Builders. This plea is fortified by the fact that the original documents were deposited with the obstructionist and documents in the form of a Will and a Power of Attorney were in addition obtained from Shri K.D. Somaia in favour of the obstructionist, the original of which are in possession of the obstructionist. It is, thus, pleaded that merely because the obstructionist did not see Shri Somaia signing these documents as stated in the cross-examination the admissibility of the said documents would not be affected as the documents may form a part of correspondence from which a presumption may be drawn that the same was genuine. Learned counsel sought to support this plea by reference to the judgement of the Supreme Court in Mobarik Ali Ahmed Vs. The State of Bombay AIR 1957 SC 857 where it was observed as under:

> "11. ....The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in Ss. 45 and 47 of the Indian Evidence Act.
>
> It may also be proved by internal evidence afforded by the contents of the documents. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position

> both with reference to his prior knowledge of the writing or the signature of the alleged sender limited though it may be, as also his knowledge of the subject-matter of the chain of correspondence, to speak to its authorship."

24. Learned counsel emphasised that all that Mr. Mehra had stated was that possession was also given for securing the amount while referring to the aspect of security of the property. There was no formalisation of the relationship as the settlement of dues did not take place but undisputedly possession of the property was handed over along with handing over of the title deed and thus the presumption is in existence under Section 114 of the Indian Evidence Act. It is claimed that the majority of the shareholding in M/s. Durga Builders was transferred to Mr. Arun Mehra and Ms. Seema Mehra and their companies by Nandas in 1997 and thus the obstructionist was assured of the security of its possession. Learned counsel pleaded that in view of Section 110 of the Indian Evidence Act an imperative presumption would be raised that the ownership of the possessor is proved until it is disproved. Learned counsel referred to the commentary of Sarkar, 16th Edition where it has been observed that presumption of law or artificial presumptions are inferences or propositions established by law, - the inferences, which the law peremptorily requires to be made whenever the facts appear which it assumes as the basis of that inference. Learned counsel emphasised that in law one can recover from own's strength and not the opponent's weaknesses in view of the legal maxim *Aequali Jure Melior Est Conditio Possidentis*. In this behalf learned counsel referred to Broom's Legal Maxim at pages 486 & 487, which has explained the said

maxim. The English translation of the said maxim means where the right is equal, the claim of the party in actual possession shall prevail. Commentary on this maxim shows that the general rule is that possession constitutes a sufficient title against every person not having better title. In this context it was observed as under:

> "The general rule is, that possession constitutes a sufficient title against every person not having a better title. "He that hath possession of lands, though it be by *disseisin,* hath a right against all men but against him that hath right" for, "till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is *prima facie* evidence fa legal title in the possessor, so that, speaking general, the burthen of proof of title is thrown upon any one who claims to oust him: this possessory title, moreover, may, by length of time and negligence of him who had the right, by degrees ripen into a perfect and indefeasible title:
>
> Hence, it is a familiar rule that, in ejectment, the party controverting my title must recover by his own strength, and not by my weakness;"

25. Learned counsel emphasised that the obstructionist had stated that the transaction was reflected in books even if the same was not in the balance sheet. In such a case the Nandas/Durga Builders cannot be said to have superior right or better title from whom the decree holder derived title.

26. Learned senior counsel emphasised that even if the title of the obstructionist was denied it could not be shown that the possession of the obstructionist was not juridical or that the obstructionist could not have resisted the possession under Section 91 of the Trusts Act and Section 60 of the Easements Act 1882.

27. Learned counsel referred to the observations of the Apex Court in

Ram Sarup Gupta (Dead) By LRs. Vs. Bishun Narain Inter College & Ors. (1987) 2 SCC 555 for the proposition that even in the absence of a written document the terms and conditions could be inferred from the attending circumstances and the conduct of the parties. Learned counsel also referred to the commentary of Snell's Equity, 13th Edition to advance the proposition that in case of a constructive trust the objector could not be turned out. It is stated in paragraph 9-45 at page 225 as under:

> "**1. General**
>
> A constructive trust may be imposed as a result of personal fraud. "It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud." It is does not follow, however, that wherever there is fraud, the fraudster is trustee for the injured party."

28. Learned counsel thus contended that the nature of transaction had to be proved and liabilities worked out before relief against the objector could be conceded or denied. It was thus claimed that the collusion between Nandas and the decree holders could not deny the obstructionist of possession.

29. Learned counsel pleaded that the decree holder was aware of the possession of the obstructionist and the decree holder has merely indulged in denial in cross-examination. It was further pleaded that there was no cross-examination of Mr. Mehra with regard to what he had stated in part of his affidavit and in this behalf referred to the observations in Yelu Pillai Padakalingam Vs. Paramanandam Yesudasan AIR 1954 Travancore 152 where it was held that the trial of a cause is aimed at arriving at the truth of the

conflicting cases that are presented before the Court. Every witness entering the box does so as a witness of truth and thus cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. The extent of its effectiveness no doubt depends upon the dexterity of the wielder of the weapon, but every cross-examiner should and can if he is careful, indicate in cross-examination, whichever part of the evidence given in examination-in-chief is challenged and an omission to do so would lead to the inference that the evidence is accepted subject of course to its being assailed as inherently improbable.

30. The aforesaid submissions advanced by learned counsels for the parties, in my considered view, had to be considered within the parameters of the present proceedings. The present proceedings are not one of a trial between the claim of title of the obstructionist and that of judgement debtors 5 to 7. The decree has been passed in favour of the decree holder and against judgement debtors 5 to 7. It is not in dispute that the obstructionist stake its claim only from judgement debtors 5 to 7. Thus, the onus was put on the obstructionist to show that they had any right in the suit property.

31. I am thus unable to accept the plea of the learned counsel for the obstructionist that the testimony of the decree holder has to be looked at with any greater degree of scrutiny than for the said purpose. It is not for the decree holder to answer queries in respect of transactions alleged between judgement debtors 5 to 7

and the obstructionist. The decree holder would have no knowledge of such transactions. It is the obstructionist who was claiming right to occupy the property and for that had to establish that some interest had been acquired in the suit property.

32. The obstructionist other than claiming possession of the original documents has not been able to substantiate any of its pleas and thus has miserably failed to discharge the onus. The transaction thus pleaded by the obstructionist is vague. No exact amount has been stated in the testimony of the witness. The amount is stated to be at the relevant stage varying between Rs.2.00 to 3.00 crore. There is no document evidencing such dues owned from M/s. Durga Builders to the obstructionist.

33. Learned counsel for the decree holder was rightly able to point out that none of the balance sheets reflected such amount as due and owning. The plea of the obstructionist that the accounts were being maintained on cash basis is contrary to the legal requirement as stipulated under Section 209 of the Companies Act whereby the making of a balance sheet on accrual basis was made mandatory from 1988. Not only that at least for the relevant financial year 1992-93 there would have been a reflection of the dues payable. The obstructionist failed to produce either the books of accounts or the balance sheet. It is the decree holder who produced the certified copies of the balance sheets obtained from the Office of the Registrar of Companies to establish that the dues were not reflected in the same. Other than the oral statement the obstructionist has not produced even

any books of accounts to establish that amount. There is also no compliance of the mandatory requirement of Section 125 of the Companies Act of the charge on the assets of the company to be compulsory created with the Registrar of Companies failing which it would not be enforceable. The charge was never created by M/s. Durga Builders nor was it insisted upon to be so done by the obstructionist. Thus the very sub-stratum of the claim is absent.

34. The second important aspect is that on the one hand it is pleaded that the transaction was in the nature of a security of immovable property and on the other hand in the oral submission the learned senior counsel for the obstructionist has sought to emphasise some sharing arrangement. There is no such sharing arrangement placed on record. If the property was taken as a security there was a mandatory requirement under the Companies Act to file relevant documents in that behalf which have undisputedly not been filed. The claim of the obstructionist not being borne out from either any account books (not produced) or the balance sheets (filed by the decree holder), it would not be really open even for the obstructionist to plead a case contrary to the same in view of the observations in Liberty Sales Services case (supra). I am also unable to accept the plea of the learned counsel for the obstructionist that there are any attending circumstances or conduct of parties in the absence of written documents, which would give rise to a conclusion that the terms & conditions alleged by the obstructionist were so arrived at.

35. The other aspect which stands as a wall in the way of the

obstructionist is that even assuming that there was such transaction the legal requirements for the same in respect of the requirement of a registered mortgage has not been fulfilled. This is apparent from the reading of Sections 58 & 59 of the TP Act. The only escape route for the obstructionist was to have established that it was an equitable mortgage by deposit of title documents not requiring such registration. However, in that eventuality the requirement in writing is necessary to show such deposit of title documents, which is absent. The witness of the obstructionist stated that there was such writing but no such writing has ever been produced. The obstructionist actually was required to file appropriate proceedings for recovery of the amount and for foreclosure of the mortgage, in case such a mortgage had been created. The obstructionist failed to take steps within the prescribed period of time to enforce the payment of money. The obstructionist cannot exercise its right in this indirect fashion in view of the observations in Ramesh Kumar & Ors. case (supra). Thus, on this account also the obstructionist has failed to establish the nature of transaction.

36. The obstructionist has really not been able to establish the date from which they came into possession because there is no writing and evidence for the same. The Local Commissioner who went to visit the premises during the pendency of the suit found no such possession. No doubt the visit of the Local Commissioner is stated to be not for verifying possession but on his visit the status of possession has been put in the report. There were no boards or

any other material to show such user by the obstructionist. It is the own case of the obstructionist that after the initial use, the room was used only as a storage space. The bills for electricity, water, telephone, etc. have also not been produced to establish any user or occupation of the same at the relevant period of time. The only defence of the obstructionist is that it is M/s. Durga Builders, which was paying the same pre-2000. This plea is difficult to accept.

37. The only conclusion which, thus, has to be arrived at is that though the obstructionist did come into possession, the same was only at some subsequent stage after the injunction order restraining the handing over of possession was passed. It is apparent that the obstructionist derived their claim from judgement debtors 5 to 7, they have to go with judgement debtors 5 to 7. The present proceeding is not for settlement of *inter se* claims between judgement debtors 5 to 7 and the obstructionist.

38. I am thus of the considered view that the issue has to be answered against the obstructionist.

Issue No.2:

> Whether the decree in question was obtained in collusion between the parties to the suit and suffers from any fraud in turn affecting the rights of obstructionists? Onus on the obstructionists

39. The onus was put on the obstructionist to establish that the decree was accentuated by any fraud or collusion. In this behalf learned counsel for the obstructionist referred to the observations of the Apex Court in Nagubai Ammal & Ors. Vs. B. Shama Rao & Ors. 1956 SC 593. Learned counsel emphasised that there is a

fundamental distinction between the proceedings which is collusive and which is fraudulent. It was observed in paragraph 15 as under:

> "15. Now, there is a fundamental distinction between a proceeding which is collusive and one which is fraudulent. "Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose." (Wharton's Law Lexicon, 14th Edn., p. 212).
>
> In such a proceedings, the claim put forward is fictitious, the contest over it is unreal, the decree passed therein is a mere mask having the similitude of a judicial determination and worn by the parties with the object of confounding third parties...."

40. Learned counsel also relied upon the commentary in the case of Kerr on the law of Fraud and Mistake 7th Edition where it was observed at page 658 that it is a general rule that a Court will not interpose actively in favour of a man who is *particeps criminis* in an illegal or fraudulent transaction. It is submitted by learned senior counsel for the obstructionist that the decree holder chose not to have a trial in the suit and even in the present execution proceedings the judgement debtors gave up their objections. The decree holder did not even choose to wait for the original documents to be handed over and thus the possession of the obstructionist being undisputed should be maintained.

41. I am afraid the aforesaid plea cannot be accepted. It is not necessary that the parties must keep on fighting endlessly and go in trial. The suit was contested for a period of nine years which itself belies that there was any immediate development. The litigation fatigue had set in and the parties compromised. There is

thus no collusion or fraud established by the obstructionist of which the onus had been put on it.

Issue No.3:

Relief.

42. In view of the findings arrived at on the aforesaid issues being against the obstructionist, the obstructionist is held not entitled to the continued possession of the first floor of the property and must forthwith hand over possession to the decree holder within a period of thirty (30) days from the date of the judgement failing which warrants of possession would be liable to be issued. Since the decree holder is the owner of the property, the original documents of transaction filed by the obstructionist in Court are liable to be handed over to the decree holder on certified copies of the same being placed on record. The objections are accordingly dismissed with costs of Rs.15,000.00 against the obstructionists.

43. List for compliance/issuance of warrants of possession on 8.2.2008.

JANUARY 04, 2008 SANJAY KISHAN KAUL, J.
b'nesh